IN THE MATTER OF The Ontario Human Rights Code
R.S.O. 1970, C.318, as amended.

AND IN THE MATTER OF a Complaint made by Betty-Anne Shack of London Ontario that she was denied employment because of her sex by London Driv-Ur-Self Limited and its servants and agents and Walter B. Phillips.

Appearances

J.I. Laskin - Counsel for the Ontario Human Rights Commission and the Complainant, Betty-Anne Shack.

D. McNamara - Counsel for the Respondents, London Driv-Ur-Self Limited, and Walter B. Phillips and Cameron Stewart.

REASONS FOR DECISION

To a large extent, findings of credibility must determine the issues in this inquiry. In May of 1973, the female Complainant, Betty-Anne Shack, had completed her third year of University and was looking for a summer job. She noticed an advertisement which appeared in the morning edition of the London Free Press on Monday May 7th, 1973. In its entirety, the classified advertisement (exhibit 6) read as follows:

"RENTAL CLERK

Required for vehicle rental firm.

Must be accustomed to meeting the public.

Have some office experience, typing and

sales experience.

Apply

HERTZ

RENT-A-CAR

2 to 5 p.m. weekdays

no phone calls please."

With respect to the events that follow, two versions were given in testimony. The Complainant's is set out first.

The Complainant testified that she attended in person at the premises of the Respondent, London Driv-Ur-Self Limited, in the early afternoon of May 7th, 1973. She said that she spoke to a gentleman at the counter who she subsequently identified as Cameron Stewart, the assistant-manager of the Respondent Company. She also saw another individual, Mr. Murray Twamley, behind the counter. According to Miss Shack's testimony, she was informed by Mr. Stewart that the advertisement had appeared on the weekend before and that the position had been filled. She nevertheless indicated that she had prior experience with a car rental agency but Mr. Stewart reiterated that the position had been taken.

The advertisements continued in the London Free Press on the following Tuesday and Wednesday and this excited the Complainant's suspicion. She then contacted an acquaintance, Mrs. Jean Headley, a rental agent with the Tilden enterprise at the airport and asked if she would make inquires to determine whether the position advertised by the Hertz agency had been filled. The information that she received back was that they were still looking for a gentleman. On Thursday May 10th, 1973, the Complainant issued a Complaint against Hertz International Licensee and then subsequently amended the Complaint naming London Driv-Ur-Self Limited as the Respondent Company when it was discovered that the latter held the franchise. The Complainant alleged that the Respondents, London Driv-Ur-Self and Walter B. Phillips acting through Mr. Cameron Stewart, denied Miss Shack employment as a rental clerk with the Respondent Company because of her sex in contravention of s. 4(1) (b)

of the Ontario Human Rights Code. Mr. Mark Nakamura was the Human Rights Officer in charge of this matter and on May 11th, 1973 he had a conversation with Mrs. Headley confirming the fact that she had indeed been contacted by the Complainant and in turn had spoken to Mr. Tony Wonch, a rental clerk with the Hertz operation at the London Airport, and learned from him that the Respondents wanted a man more than a woman because the job involved driving five ton trucks. In her testimony, Mrs. Headley indicated that, although she recalled a telephone call from the Complainant, and that the Complainant wanted Mrs. Headley to speak to Mr. Wonch at the Hertz counter, she remembered nothing more about the conversation. On May 17th, 1973 Mr. Nakamura visited the premises of the Respondents and met with Mr. Phillips, the manager of the Respondent company. He informed the Human Rights Officer that Mr. Stewart did all of the interviewing for the particular position. The two men discussed the nature of the Respondent's operation on Dundas Street and Mr. Nakamura was told that the business was primarily devoted to the rental of trucks and that a prerequisite for employment as a rental clerk would be previous experience with trucks. Mr. Nakamura was also told that there was some physical work involved, and, that on occasion, a rental clerk would have to participate in the "stripping down" of a truck. In the presence of Mr. Phillips, Mr. Nakamura then had a conversation with Mr. Stewart who said that the position in question was for a male because it might involve physicial work in stripping down trucks. In addition, Mr. Stewart expressed some concern about a woman working into the evenings alone, as was often required of a rental clerk. Mr. Stewart indicated that he had no recollection of the Complainant,

although, of the several people who applied for the position approximately 50 % were women. The individual who was hired for the position was a man by the name of Jack Laird who was interviewed by Mr. Stewart, on Monday, May 7th, 1973. In the course of the conversation, Mr. Phillips confirmed that a woman was not suitable for the job for the reasons given by Mr. Stewart.

Mr. Phillips suggested that the Complainant be identified to them and accordingly a subsequent meeting was arranged for May 22nd, 1973. On that day, the Complainant along with Mr. Nakamura attended at the Respondent's premises and identified Mr. Stewart and Mr. Twamley as the individuals who were present on Monday, May 7th, 1973. Neither Mr. Stewart nor Mr. Twamley said anything when she made the identification. Neither of them had any recollection of Miss Shack. In subsequent conversations with Mr. Phillips on May 31st, 1973 and on September 6th, 1973, Mr. Nakamura was informed once again that the policy of the Respondent Company with respect to the hiring of a rental clerk was that a man was preferred for that position.

The Respondents' version of the events is in contradiction to the case presented by the Commission, and simply put, it is that the Complainant did not attend at the Respondents' office on Dundas Street on Monday, May 7th, 1973. In attacking the Complainant's credibility, Mr. Murray Twamley testified that he did not arrive in the office until 5:30 p.m. of the day in question and accordingly, the Complainant was either insincere in identifying Mr. Twamley as being present on May 7th or that she was in error with respect to the date that she attended at

the Respondents' office. It is the contention of the Respondents that if the Complainant applied for the job in question at all, she did so on May 8th, or 9th at which time the position had already been filled by Mr. Laird. Moreover, both Mr. Phillips and Mr. Stewart testified in very forceful terms that there never existed a policy within the Respondent company that a particular sex should be hired for the position of rental clerk. And both vehemently denied that they ever said to Mr. Nakamura that they would not hire a woman, or, that a man was more suitable for the position. As far as they were concerned, a woman who otherwise was qualified, could perform the tasks of a rental clerk as well as a man and further, there was no apprehension on their part about the fact that a female may have to be alone in the office at night.

A brief word of description of the Respondents' operation should be mentioned. The rental operation at the downtown location in London concerned itself primarily with trucks. Approximately 60 % of the vehicles available for rental were trucks (67 in number) and of these, 8 or 9 were of a class commonly described as "stake trucks." A distillation of the testimony of various witnesses indicated that the Respondents, in hiring a rental clerk, were looking for the following qualifications: that the individual be able to converse well with the public; be able to handle telephone calls and place reservations; be familiar with the use of the telex and typerwiter; be able to handle cash and invoices; possess sufficient manual and physical ability so as to be able to assist in the stripping of stake body trucks; be able to pump gas into the trucks; be able to drive the trucks around the lot; and, on occasion make service calls.

I now turn to the findings of credibility. In making such findings the Board must review the evidence by testing its consistency with the probabilities affecting the case as a whole and shown to be in existence at the time. Furthermore, if the story told by a witness in regard to certain events shows that he is not to be relied upon, it is quite proper for the tribunal to take this into consideration in weighing the evidence of that witness with regard to other matters, particularly when that evidence is self-serving: Pieper v. Zinkann, (1927) 60 O.L.R. 443.

The testimony of the major witnesses called by the Respondents was riddled with inconsistencies and contradictions. When questioned by Mr. Laskin, Mr. Stewart first said that, after Mr. Laird left the Company's employment in the autumn of 1973, the Respondents had not advertised publicly for the position of rental clerk, but, that a Mr. Kier simply walked off the street in December of 1973 looking for a job, and the Respondents hired him. Mr. Stewart indicated that because the autumn was a slow period in the vehicle rental business the Respondents did not advertise for a replacement to Mr. Laird. He was then twice contradicted by the adducement of an advertisement which appeared in the London Free Press on October 10th, 1973 and a subsequent advertisement which appeared in the same paper on November 22nd, 1973. Mr. Stewart readily admitted that he placed those advertisements and gave no explanation as to why he denied this fact when he was first questioned.

Moreover, there is considerable confusion in Mr. Stewart's evidence. He first denied, then admitted, that he spoke with someone

at Canada Manpower with respect to placing an advertisement for a rental clerk in the newspaper. He was not sure, however, why he sought advice from Canada Manpower and what the advice was in connection with.

Mr. Stewart testified that when he narrowed down the number of possible applicants to two or three, he discussed the individuals with Mr. Phillips. The latter, however, said he did not consult with Mr. Stewart at all about these matters.

Although both Mr. Stewart and Mr. Phillips denied in their examinations-in-chief that they thought the job in question was more suitably performed by a male, Mr. Stewart at one point in cross-examination did say that the position was the type that was traditionally held by a man and that "it's more of a man's type of job". Mr. Phillips in cross-examination, as well, did offer the statement that it would have been reasonable for him to have made a statement to Mr. Nakamura that a man would be more suitable for this kind of work.

Mr. Twamley, whose evidence was tendered to shake the credibility of the Complainant, testified that he was not present in the rental office of the Respondent Company on Monday May 7th, 1973 until 5:30 p.m., and therefore it would have been impossible for the Complainant to have seen him when she entered the premises at the time that she said. Although possessing no independent recollection of that day, Mr. Twamley stated that he was able to determine that he was absent until 5:30 p.m. on the basis of "working it back on the calendar". He explained that the employees work a two week rotation shift and at the commencement of every second week they begin their work schedule on Monday at 5:30 p.m. Accordingly, Twamley testified that in June of 1973, by means of a calendar, he was

able to count back the alternate weeks and thereby came to the conclusion that on Monday May 7th, 1973 he commenced work at 5:30 p.m. He further testified that there was no other written documentation to assist in determining the rotation shift that he worked on the week in question. Yet when Mr. Phillips testified about this matter, he indicated that Twamley could not have been present in the office prior to 5:30 p.m. on Monday May 7th, 1973 because Twamley did not sign any contracts until after that time. He said that the company contracts which were serially numbered indicated that Twamley never wrote any contracts until 5:30 p.m. and that it was Twamley who prepared most of the contracts. This check was made, Phillips testified, on May 17th, 1973 by himself, Twamley and Stewart. With respect to this latter testimony the points in conflict are obvious. There is a discrepancy between Mr. Twamley and Mr. Phillips as to the date when they checked the records. Moreover, Mr. Twamley made no mention of the fact that resort was had to the Company's rental contracts and expressly denied any reliance upon documents other than the calendar itself. Furthermore, it is most telling that Mr. Phillips did not produce for the tribunal the contracts in question.

With respect to all three individuals, Mr. Twamley, Mr. Phillips and Mr. Stewart, it is interesting that having discovered the fact that Mr. Twamley was not present on May 7th, 1973 as alleged by the Complainant, none of them informed Mr. Nakamura of that fact. Nothing was said of this matter until the hearing before this Board. No denial was made either in May of 1973 or at any time thereafter that the Complainant attended the Respondents' premises on May 7th, 1973. Moreover, as previously mentioned, on May 22nd, 1973 when the Complainant specifically identified

Mr. Stewart and Mr. Twamley as those present on May 7th, 1973 no denial nor explanation was forthcoming. Presumably, the Respondents were certain at this time that the Complainant did not come into the office on May 7th, 1973. When confronted with an allegation of discrimination, it would have been reasonable for the Respondents to have pointed out this fact to the Human Rights Officer for, if it were true, it may have served to terminate the investigation and exculpate the Respondents. That would have been the rational and normal course to follow if in fact the Respondents were certain that Mr. Twamley was not present on May 7th, 1973. Furthermore, Mr. Stewart himself, at one point in cross-examination did concede that it was possible that the Complainant was present on Monday May 7th, 1973.

Also, the evidence of Mr. Stewart and Mr. Phillips is generally unreliable for the reason that they possess no specific recollection of certain important conversations with Mr. Nakamura but yet insist that their memory with respect to other matters is crystal clear.

When the evidence of the Respondents is compared with that of the Commission the former must give way. Mr. Nakamura was taking notes through all of the conversations that he had with the Respondents and relied upon those notes as the basis of his testimony. Because of this fact, the recollection of Mr. Nakamura would have to be preferred to that of the witnesses for the Respondents. When asked why the Board should accept the evidence of the Respondents over that of Mr. Nakamura, Counsel for the Respondents indicated that Mr. Nakamura may have been in error, notwithstanding that he was taking notes. The only basis for this suggestion was that Mr. Nakamura, in his evidence, indicated that Mr. Laird

commenced work at a later time than he actually did. Counsel submitted that if he was in error with respect to this point he may well have been in error with respect to other crucial matters. This argument cannot be accepted. Mr. Nakamura was testifying only from the data that he received from the Respondents. Accordingly, if he testified erroneously as to the commencement date of Mr. Laird's employment, it may well have arisen from information provided to him by the Respondents themselves. In any event, this inconsistency, if it is one, is so minor that it in no material way affects the probative worth of Mr. Nakamura's testimony. In estimating the probative worth of evidence when a tribunal is faced with a choice between two witnesses testifying to the affirmative and negative, respectively, one judicial guideline is that the testimony of the person who swears positively that a certain conversation took place, may be of more value than that of one who says that it did not because he who testifies in the negative may have forgotten the statements that were made, but it is not possible to remember a thing that never existed: see Lefeunteum v. Baudoin (1898) 28 S.C.R. 89 at 93 - 94 and World Marine and General Insurance Co. Ltd. v. Leger [1952] 2 S.C.R. 3. On balance there is no rational reason why this Board should not accept Mr. Nakamura's evidence as credible. Similarly, there is nothing in the evidence of the Complainant to indicate that she was other than sincere and accurate in the giving of her testimony. Respondents' Counsel suggested that the Complainant may have been so angry at the time in discovering that the job had been taken that she forgot the actual date at which she attended at the Respondents' premises. This is pure speculation and without any basis in the evidence. I find that this is

just a fanciful hypothesis which must be totally rejected. Therefore, having regard to the inconsistencies in the Respondents' testimony and the fact that their evidence is not in accord with the probabilities, the Board has accepted the testimony of the Complainant and Mr. Nakamura, and, accordingly finds that the Complainant did attend at the Respondent Company's office on Monday May 7th, 1973 and was informed at that time that the job had been taken. The Board also finds as a fact that Mr. Phillips and Mr. Stewart, on at least three occasions, indicated to Mr. Nakamura that a man was preferred for the job.

These premises having been established, the next question is: What was the reason for the Complainant being refused an interview for the position advertised? Was it because the position had indeed already been filled or was it because of discrimination by reason of sex or was it for some other reason? As Mr. Twamley was not interviewed until 3 p.m., it is clear that at the time that the Complainant applied for the job on Monday May 7th, 1973, the position was still available. She testified that she attended at the Respondents' premises "early in the afternoon" and the evidence of Mr. Nakamura was that the Complainant had told him that she was there at about 1:30 p.m. of that day. The Complainant, however, was not even granted an interview by Mr. Stewart. No explanation was given to the Complainant other than, falsely, that the job had been previously filled as the advertisement had appeared during the previous weekend. Mr. Stewart, of course, denies even giving this statement, but, as already indicated, the evidence of the Complainant is preferred.

The Board therefore feels that the Complainant was denied

even an interview and the only plausible basis for the rejection was the belief that a woman was unsuitable for the position. It is true that the evidence shows that the Complainant was seeking summer or seasonal employment only, whereas the Respondents were looking for a permanent employee. That may have been a valid and proper ground for declining employment had the Complainant been interviewed. The question, however, never arose. It is clear that the only ground of denial was one prohibited by the Code. So long as discrimination by reason of sex was the motivating course for denying employment, it is irrelevant that there may have been legitimate grounds raised if the employer had made inquiries. See The Queen v. Bushnell Communications Limited, Ottawa-Cornwall Broadcasting Limited (April 2, 1974, as yet unreported) affirming (1974) 1 O.R. (2d) 442. The Board finds therefore that the Complainant was the subject of discriminatory employment practices.

At the hearing, some discussion took place as to whether the refusal to grant an interview contravened s. 4 (1) (b) of the Ontario Human Rights Code upon which the Complaint was based. Sections 4 (1) (a) and (b), which are the relevant provisions read as follows:

> 4. (1) No person shall,
>
> (a) refuse to refer or to recruit any person for employment;
>
> (b) dismiss or refuse to employ or to continue to employ any person;
>
> because of ... sex ... of such person or employee.

An issue was raised as to whether the conduct of the Respondents may have amounted to a contravention of subsection (a), but not (b). It was urged by Counsel for the Commission and the Complainant that the interview process was subsumed in subsection (b). By refusing to grant an

interview, the Respondents, it is said, refused to employ her. Mr. Laskin first argued that s. 4 (1) (a) was intended to apply only to independent employment agencies whose business was to refer or recruit individuals for employment. This cannot be so, because s. 4 (5) of the Code expressly prohibits discriminatory practices by employment agencies, and by s. 19 (d), the prohibition under this subsection extends to persons who undertake with or without compensation to procure employees. Thus s. 4 (1) (a), if it is not to be rendered meaningless, must relate to a referring or recruiting process other than that engaged in by an "employment agency" as defined by the Code. In one sense, it is logical to conclude that, in all cases, if a person is denied access to the recruitment process, he or she is being refused employment. That would mean, however, that s. 4 (1) (a) is superfluous. Yet, by the rules of statutory interpretation, s. 4 (1) (a) must have some significance and be given a construction which is in harmony and not inconsistent with or redundant to the other provisions. It therefore must have a life separate and apart from s. 4 (1) (b) and s. 4 (5). It may have reference to the situation where the internal hiring apparatus of the employer is so organized that one department or one person has the responsibility of interviewing and processing applicants but the actual decision to employ is vested in or made in conjunction with some other department or individual. It may also envisage the situation where one internal body performs a personnel and recruitment function and successful applicants are therafter placed on a waiting list and are called to fill positions with the employer when vacancies result. In the circumstances of instant case, Mr. Stewart was delegated the sole responsibility

of finding and hiring a rental clerk. He conducted the recruiting process and made the decision to employ. The recruitment procedure and the hiring decision were not severable. The refusal to grant the Complainant an interview was therefore tantamount to a refusal to employ. Accordingly, there has been a contravention of s. 4 (1) (b) by the Respondent Company acting through Mr. Stewart. Although Mr. Phillips fostered a belief that the job was traditionally looked upon as man's work, he did not participate, either by way of instructions or conduct, in the discriminatory act against the Complainant. Thus, as against Mr. Phillips, the Complaint should be dismissed.

Having found that there was a contravention of the Act by the Respondent Company and Mr. Stewart, does s. 4 (6) apply so as to exculpate them? It provides:

> "The provisions of this section relating to any discrimination, limitation, specification or preference for a position or employment based on sex or marital status do not apply where sex or marital status is a bona fide occupational qualification and requirement for the position or employment."

Although the Respondents do not appear to have based their defence upon it, the only possible rational reason for turning down the Complainant would have to be grounded in the remarks of both Mr. Stewart and Mr. Phillips, made to Mr. Nakamura, to the effect that the position of rental clerk involved physical work in stripping down trucks and the concern that the rental clerk would have to work evenings alone.

Considerable evidence was led on the physical component of the rental clerk's duties. It is common ground that at times a rental clerk may be called upon to "strip down a stake truck". Mr. Twamley, in his testimony, indicated that he might be called upon to do this kind of work two or three times in the course of a week, and yet it is possible that three or four weeks may pass before he would have to perform this task. Mr. Nakamura learned from Mr. Sarre, Mr. Puzey and Mr. Allen, all employees of the Respondent Company that, although there was a maintenance staff present who took care of the service work generally, on occasion a rental clerk would be asked to assist in stripping a truck.

The class of vehicle known as a stake truck is one which is equipped with removable side and back rails and a covering tarpaulin, and, is generally used for farm work. If a customer desired to rent such a truck but wanted it in a flat bed condition, then it would be necessary for the staff of the Respondent Company to remove the rails and tarpaulin from the truck. The side rails are approximately 14 feet in length, and depending on the length of the truck, each rail may weigh from 40 to 80 pounds approximately. The tarpaulin weighs about

100 pounds. All of the witnesses who testified on this point agreed that the removal of this superstructure from the truck requires two people.

Having regard to this physical aspect of the job, it is important to examine the qualifications of the Complainant. At the material time she had completed her third year of University and she had had previous vehicle rental experience with a Tilden agency. In the summer of 1972 she worked for the Tilden operation in London as a rental clerk and her duties included: performing office duties such as handling the accounts receivable and payable, payroll, and taking telephone reservations. Her responsibilities also entailed driving the cars to the car wash, and, in the morning, pumping gas into those cars which had been left overnight. Although this Tilden agency had a greater supply of cars than trucks, it did offer for rent vans which were 12 to 16 feet in length, weighing up to 5 tons and occasionally, the Complainant would have to drive these vehicles which were equipped with 5 speed standard shifts, to the gas bar located on the premises and ensure that they had full tanks. This particular agency did not have any stake trucks available for rental and accordingly the Complainant did not have any experience with such vehicles during the course of this employment. During the period, September 1972 to April 1973, while she was attending McMaster University in Hamilton, the Complainant worked part time as a rental agent for Tilden Rent-A-Car at the Hamilton Airport. This agency rented out only cars.

Anticipating that the Respondents might raise as a possible defence that the Complainant was incapable of stripping a stake truck, Mr. Nakamura arranged for a demonstration to be conducted under the

supervision of Mr. John McClellan, the Complainant's former employer at Tilden. Accordingly in February of 1974, Mr. McClellan provided an 18 foot stake truck for the experiment, and the Complainant, along with a male employee of Mr. McClellan's, who had previous experience with this activity, successfully assisted in the removal of the tarpaulin, polls, and sides from a stake body truck thus converting it to a flat bed vehicle. Mr. McClellan testified that it was not a difficult operation and the experiment took about 15 minutes. With respect to the Complainant's qualifications as a rental clerk, generally, Mr. McClellan had nothing but the highest praise for her.

It was amply demonstrated, therefore, that the Complainant was suitably qualified in all respects -- in the performance of both the office and physical duties of a motor vehicle and truck rental agent. In fact, she appears to have been more qualified than Mr. Laird who was eventually hired by the Respondents for the position in question. Mr. Laird possessed no previous experience as a rental clerk. He had performed shipping work for seven years and subsequently worked for a bank. It is difficult to imagine that this background was superior to that of the Complainant in either the physical or clerical sense so as to warrant the Respondents choosing Mr. Laird. In any event, the Board does not feel that the physical demands of this partiuclar job were significant in light of the fact that the Respondent Company employed five workers to specifically look after the maintenance and service nature of the operation.

The other feature of the job in question which might bring this case within section 4 (6) of the Ontario Human Rights Code so as to sanction discrimination by reason of sex is the fact, alluded to in

the conversations that Mr. Nakamura had with both Mr. Phillips and Mr. Stewart, that there was apprehension and concern about a female working and being alone in the office from time to time. It should be noted that in her previous positions with Tilden, the Complainant was responsible for opening up the office at 6:30 each morning during the week. Usually, she was alone in the office for the first one and one-half hours each morning. At times she was responsible for closing the office at 7 p.m. and quite often worked a Sunday shift by herself from 9 a.m. until 5 p.m. She therefore did have some experience working and being alone in the early hours of the morning and evening and did not express any concern about her personal safety.

Is the physical nature of the work and the concern about the protection of the Complainant when left alone in the office at certain times, sufficient to justify the act of discrimination under sub-section 6 of section 4 of the Ontario Human Rights Code? In view of the paucity of Canadian authorities, it is useful to examine American legislation which has served as the prototype for the Ontario Act. Section 703 of the Equal Employment Opportunity Act of 1972 which amended Title VII of the Civil Rights Acts of 1964 (42 U.S.C.S. section 2000 e et seq.) has a saving provision expressed in similar terms as section 4 (6) of the Ontario Act. It reads:

> "Notwithstanding any other provision of this sub-chapter, it shall not be an unlawful employment practice for an employer to hire and employ employees, ... where ... sex ... is a <u>bona fide</u> occupational qualification reasonably necessary to the normal operation of that particular business or enterprise".

The United States Court of Appeals, Fifth Circuit, in considering this provision in the case of Weeks v. Southern Bell Telephone and Telegraph Company (1969) 408 F. 2d. 228 made it clear that the burden of proof rests with the employer to demonstrate that the position in question fits within the "bona fide occupational qualification" exception. Johnson, D.J., stated that the exception was intended to be narrowly construed and that in interpreting a humanitarian remedial statute which fulfills a public purpose, the burden should lie upon the person who asserts an exception to the general policy of the legislation. In this regard, cognizance should also be taken of s. 10 of the Interpretation Act, R.S.O. 1970, c. 225 which reads as follows:

> "Every Act shall be deemed to be remedial, whether its immediate purport is to direct the doing of anything that the Legislature deems to be for the public good or to prevent or punish the doing of any thing that it deems to be contrary to the public good, and shall accordingly receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit."

The Board agrees with the reasoning in the Weeks case and, accordingly, if section 4 (6) is to provide a defence then the burden is upon the Respondents to so demonstrate. The more important question, however, is whether the two excuses embodied in the conversations with Mr. Nakamura, in law, could ever amount to "a bona fide occupational qualification and requirement for the position or employment". On this point too, the American authorities are helpful, The Weeks case, already referred to, again presents an interesting illustration. There it was

held that a woman, who applied for the position of switchman with the defendant company, was wrongly discriminated against. Nor did the Court accept as an excuse that the job required, as a routine and regular habit, the lifting of equipment weighing in excess of 30 pounds. Evidence was led in that case demonstrating that the plaintiff was in fact capable of performing this physicial feat. The Court held, moreover, that it was not sufficient to bring an employer within the saving statutory provision merely by the labelling of a job as "strenuous". More than that had to be shown. The employer had to establish "that he had a reasonable cause to believe, that is, a factual basis for believing, that all or substantially all women would be unable to perform safely and efficiently the duties of the job involved" and the defendant company adduced no evidence concerning the weight-lifting abilities of women. Accordingly, the Court held that the defendant's preference of men over women for the switchman position was not justified. And in Diaz v. Pan Am World Airways Inc. (1971) 442 F. 2d. 385, the same Court, although differently constituted, added that discrimination in hiring based on sex, is valid only when there is a threat that the essence of the business operation would be undermined by not engaging members of one sex exclusively.

Applying these principles to the present inquiry, it becomes clear that the physicial requirement of the rental clerk position does not excuse the denial of employment to women. The Respondents have not demonstrated, and in fact have conceded in their testimony, that women are as capable as men in physicially converting a stake truck.

The physicial work, is therefore not beyond the capabilities of all or substantially all women. Furthermore, having regard to the fact that this physicial labour is of such minor importance to the operation of the Respondent's business, this factor cannot justify preferential treatment for men.

As to Mr. Stewart and Mr. Phillip's statement that the job required the clerk to be alone in the office at odd hours, the Weeks case again provides some guidance. In addition to the strenuous nature of the activity involved, the position of switchman necessitated being called out at all hours and on occasion being required to work alone during late night hours including the period from midnight to 6 a.m. The Court dismissed this as being an unacceptable reason for discrimination. This is merely one of the "sterotyped characterizations of the sexes" which the Supreme Court of the United States in Phillips v. Martin Marietta Corp. (1970) 400 U.S. 542 has held that employers must abandon. If the concern was for the personal safety of the Complainant and she was prepared to accept the risk, this factor would have no bearing whatsoever upon her ability to perform the job in question. If the Respondents were concerned that her being alone in the office at night would make the business more susceptible to crime such as robbery, no evidence has been led which would indicate that business offices occupied by a sole female have been the subject of more crime than those managed by a lone male. With respect to both factors and the interpretation of section 4 (6) of the Ontario Human Rights Code, I think the words of Johnson, D.J., in the Weeks case are most apposite:

> "Title 7 rejects just this type of romantic paternalism as unduly Victorian and instead vests individual women with the power to decide whether or not to take on unromantic tasks. Men have always had the right to determine whether the incremental increase in remuneration for strenuous, dangerous, obnoxious, boring or unromantic tasks is worth the candle. The promise of Title 7 is that women are now to be on equal footing. We cannot conclude that by including the bona fide occupational qualification exception Congress intended to renege on that promise."

Women are not a homogeneous group. It is no more realistic to accept the proposition that they all desire and are suited for a homemaking career than to assume that all men are endowed with a mechanical instinct.

For all of these reasons, even if the comments made by Mr. Phillips and Mr. Stewart to Mr. Nakamura were given full value, no case has been made out that the rental clerk position fits within the "bona fide occupational qualification and requirement" provision so as to excuse the discriminatory practice of the Respondents.

By way of relief, Counsel for the Commission and the Complainant urged that the Complainant be compensated for the loss of remuneration for the period, May 10th, 1973 to June 4th, 1973. The first date is when Mr. Laird commenced his employemnt with the Respondent Company and the latter is the date on which the Complainant was able to secure alternative employment. Mr. Laird's salary at that time was $105.00 per week and accordingly compensation in the amount of approximately $400.00 is sought. Mr. McNamara, Counsel for the Respondents, on the other hand, argued that the Complainant is not entitled to this remedy because, as she was

seeking summer employment only, and as the Respondent Company was looking for a full time permanent employee only, it is clear that if she had been interviewed on May 7th, 1973 she would have been denied employment for this valid reason. The Board is inclined to agree with the latter submission and feels that, although the issue of summer employment relates in no way to the act of discrimination, it does have a significant bearing on this quesiton. Accordingly, the Board declines to make this order for compensation.

The Complainant also seeks general damages for the humiliation and frustration caused by the Respondent's discriminating act. In a previous Board decision, Gabbidon v. Golas, (July 9th, 1973) it was held that the power of the Board "to make compensation" under section 14 c.(b) of the Ontario Human Rights Code was wide enough to include an award for general damages. Counsel for the Respondents in this proceeding conceded that the Board has such authority but urged that if such compensation is ordered an amount smaller than the one suggested by Counsel for the Commission and the Complainant be imposed. The first question, then, is whether the discriminating act in question warrants an award of general damages. I think it does. Discriminatory acts against women impose upon them a feeling of inferiority and frustration no less than that experienced by other groups. Only the most psychologically conditioned to such treatment would not be sensitive to the dehumanizing consequences of being forced to lead severely restricted economic lives. The Complainant, I believe, did experience upset and frustration and accordingly, the Board feels that an award of general damages should

be made. Having regard to the fact that the Respondents' conduct was not malicious but was motivated by traditionally held views about women, which unfortunately are still maintained by many in society, $100.00 is considered to be a proper compensatory award under this head of damage.

In view of the uncompromising nature of the dispute between the parties the Board does not feel that the Respondent Company should be required to offer the Complainant a special opportunity to apply for the next available position of rental clerk in advance of any public advertisement. A letter of assurance, however, should be written by the Respondent Company to Dr. Walter Currie, Acting Chairman of the Ontario Human Rights Commission that in the future, it will abide by the standards of the Ontario Human Rights Code. Furthermore, for a period of one year following the date of this decision, notification is to be given to the Ontario Human Rights Commission by the Respondent Company of any future employment opportunities with it prior to any public advertisement.

DATED AT Toronto this 7th day of June 1974.

S.N. LEDERMAN
Chairman, Board of Inquiry

R.S.V.P.

IN THE MATTER OF The Ontario Human Rights Code
R.S.O. 1970, C.318, as amended.

AND IN THE MATTER OF a Complaint made by Betty-Anne Shack of London Ontario that she was denied employment because of her sex by London Driv-Ur-Self Limited and its servants and agents and Walter B. Phillips.

O R D E R

This matter coming on for hearing on the 7th and 8th days of May, 1974, before this Board of Inquiry, pursuant to the Appointment of Fern Guindon, Minister of Labour, dated the 19th day of February, 1974, in the presence of Counsel for the Human Rights Commission and the Complainant, Betty-Anne Shack, Counsel for the Respondents, London Driv-Ur-Self Limited and Walter B. Phillips, and Cameron Stewart, upon hearing read the Complaint and the evidence adduced and what was alleged by Counsel:

1. It is ordered that the Respondent Company write a letter of assurance to Dr. Walter Currie, Acting Chairman of the Ontario Human Rights Commission, that in the future it will abide by the standards of the Ontario Human Rights Code.

2. And it is ordered that the Respondent Company give notice of any employment opportunity to the Ontario Human Rights Commission for a period of one year following the date of this Order. Such notice should be given prior to any public advertisement.

3. It is further ordered that the Respondent Company pay the sum of $100.00 by way of compensation to the Complainant.

DATED this 7th day of June 1974.

S.N. LEDERMAN
Chairman, Board of Inquiry